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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 40

UNITED STATES OF AMERICA, APPELLANT

v.

ROSCOE DENMARK

No. 41

UNITED STATES OF AMERICA, APPELLANT

v.

MILTON BRAUN

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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I. STATEMENT OF FACTS

The facts as stated in the transcript of the records and in the Brief of the United States are correct.

II. ARGUMENT AND AUTHORITIES

1. HISTORY SURROUNDING THE ACT AND ITS APPLICATION TO APPELLEES.

The Act under which these Defendants are prosecuted is known as Public Law 906, 81st Congress (1950) and is codified in United States Code, Title 15, Section 1173. This section requires all dealers and manufacturers in gambling devices as defined in Title 15, USCA, Section 1171, to register with the Attorney General and to file monthly reports of sales and inventories. When this Act was before the Congress there was much discussion as to what was intended by the Act. In the beginning it was known as the Johnson Act and was sponsored by Senator Johnson of Colorado. In the course of the hearing on the Bill we gained some knowledge of what was intended by Congress in passing this law. In Congressional Record No. 19 of September 11 to September 23, page 15360, Senator Johnson made this statement:

"In drafting this bill we leaned far backwards to give the States every opportunity absolutely to run their own affairs. We have had proposed legislation which attempted to invade the State's jurisdiction. This bill very scrupulously avoids doing that. It allows every State to run its own business."

On the same Bill, Senator Malone said: "What is attempted is merely to prohibit gambling devices to enter areas where they are illegal."

Senator Johnson further stated on Page 15363: "Let me say here and now that this is one of the few bills in the last two decades which is scrupulous about State's rights; it keeps the Federal Government out of State and local police powers; no Federal official is going to become an enforcement officer in any State or locality. All it does is exercise the constitutional duty of the Federal Government with respect to interstate commerce by denying the avenues of such commerce to slot machines unless a State has made the operation of slot machines within that State legal."

Again in United States Congressional Code Service, 81st Congress, 2nd Section (1950), beginning on page 4240 we find some history of the Act. It is there stated that: "the primary purpose of this legislation is to support the policy of those States which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate commerce for the shipment of such machines or devices into such States." On page 4243 it is said: "It was contended by the proponents of the bill that the State and local law enforcement officers are unable to cope with these organizations on the State and local levels, and that Federal assistance is required by closing the channels of interstate commerce to the shipment of slot machines and similar devices." On page 4244, it is stated: "On the other hand, the committee desires to emphasize that Federal law enforcement in

the field of gambling cannot and should not be considered a substitute for State and local law enforcement in this field."

Further on page 4244, it is stated: "In this approach your committee is in complete agreement with the views of the Attorney General with respect to the purpose of the recommended legislation, as stated by the representative of the Attorney General in the course of the hearings (page 55):

> "The only thing that the Federal Government is being asked to do under this bill is to stop, in the channels of interstate commerce, the shipment of these machines which the States are powerless to keep out of the channels of interstate commerce. Actually enforcement against those people who gamble or use these machines wrongfully in the States is left with the States and with the local officers, and there is absolutely no intention on the part of the Federal Government, express or otherwise, in this bill or anything that accompanies it, to get us into a prohibition era."

The foregoing indicates the intention of the Congress to eliminate from interstate commerce gambling machines and similar devices. Therefore in the final enactment of the bill and its codification we have Title 15, Section 1172, which prohibits the shipment of such devices in interstate commerce.

In addition to the foregoing with reference to the idea behind this bill, we have Section 1173 of Title 15, USCA, which will be referred to and discussed as the section with which these defendants are

charged with violating, with reference to the history of the Section and the Defendants' contention that the section is too vague and indefinite to be enforced as a criminal statute for the reason that this section requires a dealer to register with the Attorney General his name or trade name, the address of his principal place of business and the addresses of his places of business in said district, and requires a dealer to file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceeding calendar month for the place and places of business in the district. When this Act was being considered by the committee in its original form, it provided that registration should be made with the Collector of Internal Revenue in the district of the dealer. The Secretary of the Treasury suggested that perhaps the Collectors of Internal Revenue were designated in what is now Section 1173, Title 15, USCA, because of the fact that an annual license is imposed upon persons who maintain for use coin operative gambling devices. The Secretary pointed out, however, that the taxes are imposed upon the person who permits the use of such device on his premises, and not upon the manufacturer or dealer, or operator.

On page 4253 of the United States Code Congressional Service, 81st Congress, 2nd Section, there is quoted a letter from the Acting Secretary of the Treasury which points out that since this Act has no revenue fees and is purely an enforcement statute that the Revenue Department should not be the department with whom the dealers and manufacturers

should register or who should receive the monthly reports.

Apparently, the original draft of the bill has been changed by eliminating the registration with and the reports to the Collectors of Internal Revenue, and there was inserted in lieu thereof the requirement that the registration should be with the Attorney General, and that the reports should be made to the Attorney General. But, by so doing, the lawyers failed to designate the district which must be referred to in the law as "such district" and "the district." We consider a district a definitely defined area and we believe the record of this case will show that the Attorney General of the United States recognizes this deficiency in filing its appeal to this Court where it stated that the Attorney General designated the District Attorney of Illinois as the person with whom dealers should register and file reports as residents of Illinois, and all other dealers of the United States should register with and report to the Attorney General in Washington. It will be argued herein that the Attorney General was given no power by Congress in this law to make any regulations concerning enforcement, and there was no delegation of authority to name any geographic district for any person, and we will respectfully contend that the Act as passed and codified creats an impossibility or is so vague and indefinite that no reasonable person could determine the meaning of the words "such district" and "the district".

Section 1173 of Title 15, USCA is very closely related to the Sections of the Harrison Narcotic Act

which require dealers in opiates, etc., to register and pay license fee before dispensing such narcotics, except that in the Narcotic Act the means of registration and the payment of license is fully set forth.

We would like to point out to this Honorable Court at this point to erase any doubt that may exist, that slot machines are illegal in Georgia under provisions of Code Sec. 26-6502, Code of Ga. 1933, which reads as follows:

"Any person who, by himself or another, shall keep, maintain, employ, or carry on any lottery or **other scheme or device** for the hazarding of any money or valuable thing, shall be guilty of a misdemeanor. (Acts 1877, p. 112.)"

The above quoted Georgia Code Section is construed to include slot machines in the case of ELDER V. CAMP 193 Ga. 320 (see page 321):

"An apparatus known as a slot machine by which a person depositing money therein may, by chance, get directly or indirectly money or articles of value worth more or less than the money deposited, falls within the purview of this section . . ."

"The keeping of a slot machine of the character described being unlawful, ordinarily and prima facie where an owner or operator is found in possession of such a machine, the apparatus is contraband."

The reason that we cite this code section is perhaps the government may contend that interstate commerce of slot machines is not absolutely prohibited

by the Act, due to the provisions of the exception in Sec. 1172 which reads as follows:

"Provided, that this section shall not apply to transportation of any gambling device to a place in any state which has enacted a law providing for the exemption of such State from the provisions of this section, or to any place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section."

Georgia has never passed such an act and there can be no interstate commerce in slot machines, as far as persons in Georgia are concerned.

Bearing in mind the language of the representative of the Attorney General heretofore quoted, the proper construction of this Act, we feel, is this: that all shipments of gambling devices in interstate commerce are prohibited except to those States where the same are legal. Manufacturers or dealers shipping into those States where it is legal should be required to register with the Attorney General and file an inventory. This construction of the Act would allow Sec. 1173 to be held to be constitutional with regard to certain transactions. But we insist that it is unconstitutional with regard to purely intrastate transactions.

In view of the history of the Act, its purpose and intention, we respectfully contend that the Defendants in these cases have not been charged with an

enforceable offense against the United States for two reasons:

(1.) The indictment does not charge either defendant with having made any sale in interstate commerce and shows as a matter of fact that every sale complained of as to each defendant was wholly within the Southern District of Georgia.

(2.) That the Act with reference to the places of registration and reports is incapable of ascertainment as to the district as referred to in the Act.

2. DECISIONS OF LOWER COURTS ON TITLE 15, SECTION 1171-1177 DISCUSSED.

Up to this date we have found the following decisions that have been reported dealing with 15 USCA, Section 1171-1177:

U.S. V. 65 SLOT MACHINES, 102 Fed. Sup. 922. This case does not deal with the questions involved before the Court in the present case. However, on page 925, we do find this:

"This federal statute, however, **has no effect whatever upon any devices or property which was not and continues to remain intrastate; it simply anchors it there,** in so far as interstate transportation is concerned, until the State changes the law." (Emphasis ours).

The case of SMITH ET AL V. McGRAW, ATTORNEY GENERAL 103 Fed. Sup. 286, deals primarily with the meaning of the word "dealer" as used in said

Act. It does not deal with the questions involved in the present case.

In the same volume we find the case of U.S. V. 200 GAMBLING DEVICES, 103 Fed. Sup. 886, which deals likewise with the meaning of the word "dealer" and has an application to the questions involved in the present case, as we will demonstrate later. We quote the Court on page 888 as to the meaning of "dealer": "A dealer in the common acceptance of the word, and therefore, in the legal meaning of the word, is not one who buys to keep or makes to sell, but one who buys to sell again."

In the case of **U. S. V. Prock et al**, 105 Fed. Sup. 263, it was held that: "The statute prohibiting transporting of gambling devices to any place in the states, District of Columbia, or possession of United States from any place outside of such state, District of Columbia, or possession **applies only to shipments in interstate commerce and has no application either to shipments of gambling devices in intrastate or foreign commerce.**" (Emphasis ours.)

The case of U.S. V. 2 EXHIBIT ROTARY COIN OPERATIVE GAMBLING DEVICES, 107 Fed. Sup. 314 deals with what sort of gambling devices are prohibited by the statute and has no bearing on the present case.

The case of U. S. V. 178 and 48 gambling devices, 107 Fed. Sup. 394 does not touch on the points involved in the case. The Court held that "careful study of the Act together with previous decisions of the Su-

preme Court of the United States thought to be somewhat similar, has convinced me that the act can only be applicable in interstate transactions." (Emphasis ours.)

Further said on page 396: "But to penalize the possessor or user of such devices or 'destroy the use of the device itself' where it has not offended interstate commerce provisions would in effect require a holding that the act created a substantive offense aimed primarily at intrastate commerce over which Congress has not power. This could not be said to be for the legitimate purpose of implementing interstate commerce provisions. The construction for which the government contends would, in my judgment, place such provisions beyond the reach of Congress." (Emphasis ours.)

In U. S. V. SCHMIDT 107 Fed. Sup. 501, a three judge court held that the parties had an administrative remedy and therefore were not entitled to an injunctive relief.

In the case of U.S. V. 139 SLOT MACHINES, 109 Fed. Sup. 23, the Court held that "persons purchasing slot machines as investments and operating them intrastate in others' places of business at profit, instead of selling them, were not "dealers" in gambling devices, required by the act prohibiting transportation of such devices in interstate commerce to register with the Attorney General, so that machines, in being possessed or used in violation of the Act, were not subject to forfeiture or confiscation."